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Transnational Law and Economic Sociology

Sabine Frerichs

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Introduction: Including the Unclassified

Any classification system is arbitrary with regard to the “state of natural indistinction” (Youziang 2007, 311). This is the lesson of Borges’ famous example of “a certain Chinese encyclopaedia”, according to which “animals are divided into: (a) those that belong to the Emperor, (b) embalmed ones, (c) those that are trained, (d) suckling pigs, (e) mermaids, (f) fabulous ones, (g) stray dogs, (h) those that are included in this classification, (i) those that tremble as if they were mad, (j) innumerable ones, (k) those drawn with a very fine camel’s hair brush, (l) others, (m) those that have just broken a flower vase, (n) those that resemble flies from a distance” (Borges 1964, 103). No matter if this taxonomy of animals from imperial China is only “partly verifiable and partly fictional” (Youziang 2007, 310), it is more complete than many other classification systems in that it leaves room for the unclassifiable (Maciel 2006, 48), which is included under “(l) others”. If “every classification system is haunted by its exclusions, separations and forced hierarchies, its conversion of fluid emergent processes and events into stable categories” (Featherstone and Venn 2006, 8), so is the law.

The question ‘What is transnational law?’ (Cotterrell 2012) can be understood in different ways. If it is understood in a positivist way, it suggests that transnational law actually exists, that it can be found in reality. If it is understood in a constructivist way, it suggests that it makes sense to speak of transnational law, that it is useful as a concept. Either way, the question calls for a definition of transnational law: What is it distinguished from? What is included and what is left out? According to Jessup’s classical definition, transnational law covers “all law which regulates actions or events that transcend national frontiers”, which includes public and private international law as well as “other rules which do not wholly fit into such standard categories” (Jessup 1956, 2). Besides the established bodies of

international law, Jessup thus also considers rules of a different pedigree, which likewise ‘regulate’ cross-border situations but which so far escaped classification.

In this chapter, we will locate the ‘other rules’ that transnational law is concerned with in the global economy. In this regard, we follow the turn from ‘form’ to ‘function’, by which the new discipline of transnational law distinguishes itself from conventional legal scholarship. At first, this may be understood as a turn from law to economics. Indeed, it can be held that the ‘nature’ of transnational law reflects the economic order that arises from, or is imposed upon, economic activity and exchange across the world. However, analytically speaking, this account is far too simple and, normatively speaking, it is also misleading. Neither can the substance of transnational law be identified with the ‘law of the market’, nor is the discipline of transnational law but another variant of ‘law and economics’. Or, at least, this should not be the case. Drawing on classical and contemporary perspectives in economic sociology, this chapter aims to make a more complex argument, which resonates with the epistemological ambitions of this volume: it exposes the constructed nature of the ‘law of the global economy’, which is constitutive for the market society of today, and elucidates the ‘elective affinity’ between law and economics, which also affects our understanding of transnational legal ordering. In doing so, this chapter exemplifies the research agenda of the economic sociology of law (Swedberg 2003; 2006; Frerichs 2009; 2011b; 2016; Ashiagbor et al. 2013; 2014).

The economic sociology of law has been defined as “a sociological analysis of the role of law in economic life”, which was found to be missing, if not in the works of the sociological classics, so at least in contemporary economic sociology (Swedberg 2003, 1). Even though it has to be acknowledged that some scholars in the sociology of law and the related field of ‘law and society’ research did have an eye on the economy as well, the longest-standing tradition in bringing law, economy, and society together is in critical political economy (ibid., 1-2; cf. Edelman and Stryker 2005; Frerichs 2011b; 2012). After an orientation about what transnational law is, what economic sociology is, and where the two come together, this chapter turns to critical scholarship exploring the ‘homology’ of law and economics in capitalist societies. Building on this line of thinking, the birthplace of transnational law may be located in the globalised market society, but it can also be subjected to ‘re-construction’.

Transnational Law: The Nature of the Beast

Jessup's embrace of the unclassified 'other law' resonates with contemporary quests to understand the "changing nature of the beast" that law is under conditions of globalisation (Zumbansen 2004, 1520). To "learn the name and nature of the beast before us" requires overcoming the epistemological obstacles of law as a discipline, and thinking, perhaps, in more "functional" terms (Zumbansen 2015, 226; emphasis omitted). In the last decade, debates about the phenomenon and the concept of transnational law have intensified. Still, its nature remains elusive. As Cotterrell (2012, 501) notes, "[t]he new term [...] is widely invoked but rarely defined with much precision". Likewise, Shaffer (2016, 2 [draft]) observes that "[a]lthough scholarship increasingly refers to transnational law and legal ordering, it is often vague regarding what these terms encompass". In particular, there is no consensus as to whether transnational law includes all national and international public and private law pertinent to cross-border situations, or whether it should be confined to contemporary phenomena of non-state law only, namely forms of transnational private regulation (Cotterrell 2012, 501). A respective focus on transnational "private legal ordering" is juxtaposed with a focus on transnational legal ordering that "incorporates both public law and privately made norms and institutions" (Shaffer 2016, 3 and 8 [draft]).

The task to "map" transnational law as a new legal field that transcends conventional boundary lines (Cotterrell 2012, 500) quickly turns into a "mapping exercise" of related scholarship (Shaffer 2016, 2 [draft]), which somewhat curiously, but not surprisingly, reflects the intra-disciplinary division of labour as much as the old dichotomies of theorising about law. Thus, Shaffer's review essay, which is organised in three parts, illustrates the diverging interests of private lawyers (in the possibilities of private legal ordering), of public lawyers (in the 'shadow' of public law over private norm-making), and of legal theorists (in the changing concept or construction of 'law'). Cotterrell's respective piece, which takes von Daniels' (2010) and Calliess and Zumbansen's (2010) books as a starting point, systematically works through pairs of concepts classifying ordinary law, such as "private and public, bottom up and top down, substance and procedure, primary and secondary rules, *ratio* (principle and reason) and *voluntas* (coercive authority)" (Cotterrell 2012, 514; reference omitted).

The present handbook "aims at offering a comprehensive compendium for the field of Transnational Law (TL) by providing a unique and unparalleled treatment and presentation in an area that has become one of the most intriguing and innovative developments in legal doctrine, scholarship and theory today" (Zumbansen, this volume [book proposal p. 7]). While it does not impose any working definition of what transnational law is, or what it is

meant to be, the ambition behind this project is more than a gigantic mapping exercise. The present volume also seeks to suggest directions as to the study and construction of transnational law and to provide common ground for legal and social-scientific enquiry. This can be illustrated with the epistemological turn from ‘form’ to ‘function’, from ‘substance’ to ‘process’, and from ‘field’ to ‘method’, which informs this endeavour. We will first clarify this starting point and situate the project at the interface of law, economics, and sociology, before turning to the perspective of economic sociology, more specifically.

(1) The turn from ‘form’ to ‘function’ is particularly emphasised where law meets economics. In this regard, we can speak of an economic-functionalist approach to transnational law, or a functionalist approach to transnational economic law. Shaffer (2016, 4 [draft]; emphasis omitted) exemplifies this with the “law and economics of the new *lex mercatoria*”. Inasmuch as the transnational law merchant is the exclusive domain of private legal ordering, it is altogether “in a different regulatory category” from international economic law, as this is classically understood (Cotterrell 2012, 510). However, the latter has likewise been reinterpreted in economic-functionalist terms. It is then “not defined by its legal sources but rather by its object: the global economic system” (Ortino and Ortino 2008, 94). If we speak of transnational economic law in its most comprehensive sense, it can be equated with the “law of the global economy” (ibid.), which consists in national as well as international law, private as well as public law, to the extent that they shape “transnational economic relations” (ibid., 90). In this functionalist understanding, transnational law obviously cuts across various traditional legal fields and disciplines. Moreover, besides “formal laws”, it also includes “informal laws, such as non-legally binding customs and practices influencing economic behaviours”, which are neglected in the core of legal scholarship (ibid., 93). Hence, the question of what transnational law is, or how it is defined best, is answered not by its legal form but by its economic function. While the functionalist approach plays an important role in defining transnational (economic) law, or in reconceiving law beyond the categories of national and international, public and private, it comes along with normative assumptions that one might not want to espouse, such as privileging a market-based regime of legal ordering and self-regulation (Zumbansen 2008, 798). Analytically speaking, it lacks a critical reflection of the relation between the law and the economy, or between law and economics for that matter.

(2) The turn from ‘substance’ to ‘process’ is particularly highlighted where law encounters sociology, namely in the realm of law and society research. This heterogeneous field of scholarship combines different paradigms and perspectives rooted in legal realism: a social-

scientific approach to law, which is based on an empiricist conception of science and an instrumentalist understanding of law. One of the strands of legal realism, which developed at the interface of law, political science, and sociology and which “was among the first to recognize the emerging importance of transnational law” (Koh 2007, 564; emphasis omitted), is known as the ‘New Haven School of International Law’ or the ‘Transnational Legal Process School’. A core commitment of this school is the study of (transnational) law not only as a substance – “a hybrid body of law that transcends old dichotomies” (ibid., 566) – but also as a “process of authoritative decisionmaking” between actors on different levels and of different kind (ibid., 562). By emphasising the internalisation and, eventually, construction of rules in “interpretive communities” (ibid., 567, fn. 54), the Legal Process School aligns itself with constructivist thinking in political science, sociology, and beyond (ibid., 570; cf. Halliday and Shaffer 2015, 21). Building on this approach, Halliday and Shaffer emphasise “the contingent, dynamic, and interactive processes” by which transnational law “becomes binding and authoritative”, irrespective of its formal dignity (Halliday and Shaffer 2015, 17; emphasis omitted). The very concept of law is thus understood in “processual” terms (ibid., 18). This resonates with the agenda of “today’s postrealist law and society research”, more generally (Sarat 2004, 7). Whereas legal realism, as it emerged in the twentieth century, was characterised by a firm belief in scientific knowledge and social engineering, this “optimism” was shattered by theoretical disputes and political crises in the latter part of the century, which led to greater modesty in the field (ibid.). As a result, one can witness an “[i]ncreasing abandonment of the reformist policy orientation of scholarship in favor of the description and analysis of the processes through which law performs in various social domains” (ibid.). In fact, much socio-legal scholarship is now constructivist in orientation. The question what transnational law is then turns into how it is constructed and by whom.

(3) The turn from ‘field’ to ‘method’ is most explicit where legal theory merges with social theory in re-constructing transnational law in cognitive as well as normative terms. Scholars at this intersection are particularly interested in how the concept of law changes, or how law can be reconceived, in the transnational domain. Shaffer (ibid., 15 [draft]; emphasis omitted) refers to this approach as one that “develops conceptual and critical theory to interrogate and reformulate the concept of law in transnational terms”. Instead of describing the body of transnational law, this “conceptual and methodological approach” (Zumbansen, this volume [book proposal p. 4]) is interested in developing the perspective of transnational law, which has already been explored in prior work by the editor of this volume. Drawing on Jessup’s expansive definition of transnational law, which also includes ‘other rules’, Zumbansen thus

claimed ten years back: “It is the hallmark of TL to identify the hidden agendas and the blind spots of traditional regulatory law understandings. These are marked by clear assignments of law-making authority to certain institutions and a clear view of which norms of societal guidance are to be recognised as *legal* rules. In contrast, TL suggests a widening of the law-making agenda and of our understanding of law as such.” (Zumbansen 2006, 300; original emphasis) The empirical focus of these earlier studies was on how transnational law comes into being outside or alongside conventional law-making authorities (Calliess and Zumbansen 2010, 21), that is, how it “emerges from the increasingly interlocking spheres of societal norm production by public, official and private, unofficial norm-setting agencies and actors” (Zumbansen 2006, 300). However, the analysis then also turned to the law itself, its authoritative definition and constitutive function. This is explained as follows: “We understand transnational law primarily as a *methodological* perspective rather than as a demarcated substantive field of law. While we think that every field of law is in fact at the core an expression of a specific methodological programme by which we arbitrarily/decidedly distinguish between, say, contract and property, labour and corporate, or ‘public’ and ‘private’ law, transnational law offers, in fact, a particularly rich set of opportunities to explore the methodological architecture that leads to the constitution of legal fields.” (Calliess and Zumbansen 2010, x; original emphasis) Hence, postulating the existence of transnational law as a legal field means, at the same time, redefining the law. This necessitates methodological self-reflection, which includes revisiting the distinction between law and non-law (ibid., 21). In doing so, the ‘reconstructive’ theory of transnational law aims to come to grips with the changing nature of the beast before us: “Be it Tiger, Lion or Dragon (thus, not an animal per se, but a fairy tale creature), they are all dangerous, regardless of their name.” (Zumbansen 2015, 226)

Economic Sociology: Contextualising Economics

What is economic sociology? And why should students of transnational law bother? In simple terms, economic sociology is “the sociological perspective applied to economic phenomena” (Smelser and Swedberg 2003, 3). In more elaborate terms, it is “the application of the frames of reference, variables, and explanatory models of sociology to that complex of activities which is concerned with the production, distribution, exchange, and consumption of scarce goods and services” (ibid.). Put differently, economic sociology is a sub-discipline of sociology, which deals with the economy. It shares its theoretical outlook with sociology and

its subject area with economics. Quite obviously, then, economic sociology is engaged in boundary-work.

The relationship between sociology and economics has occasionally been conceived as one of clear division of labour and peaceful co-existence. Focusing on different spheres of society, such as markets on the one hand and polities or communities on the other, or on different motives of action, be it self-interest, domination or obligation, the two disciplines would then complement each other, and not much interfere with each other (cf. Velthuis 1999, 633-634). This view, prominently held by the American sociologist Talcott Parsons, “legitimated the mutual neglect of economists and sociologists” for the most of the twentieth century (ibid., 639). However, as the ‘study of society’, sociology obviously refers to society as a whole, and not to a residual category which leaves an important part of social life – the economy, or market exchange – out of the picture. Contemporary economic sociologists thus emphasise that the economy proper is not free from, but imbued with, power and culture (Fligstein 2001), and that market and morality are not mutually exclusive but, in fact, closely intertwined (Fourcade and Healy 2007). One of the fundamental claims of the discipline, or sub-discipline, is that markets are embedded in societies, and that states and markets are co-constituted (Polanyi 1957 [1944]).

This suggests a different view of the relationship between economics and sociology: as one of contestation and competition (Swedberg 1987, 11 and 121). Indeed, many sociologists are quite critical of their neighbouring discipline, or at least of its theoretical core. Consequently, economic sociology includes a sociology of economics (cf. Zafirovski 2001), that is, a sociological critique of the economic discipline. Hence, economic sociology not only enters the subject area of economics but it directly challenges the latter’s theories, namely the neoclassical approach, or what is referred to as mainstream economics. On this account, the opposition to mainstream economics is a key feature of economic sociology (cf. Smelser and Swedberg 2005, 3-6) and could even be seen as its lowest common denominator. Indeed, in defining and defending their discipline, “economic sociologists have chosen to emphasise what unites them against neoclassical economics rather than what divides them as sociologists” (Krippner and Alvarez 2007, 234).

The reason why students, or even experts, of transnational law might want to turn to economic sociology is that they will most likely come across economic arguments, or the effects thereof, in their various areas of interest. This obviously concerns transnational economic law, which can be understood to include the ‘social law’ regulating the economy (Kennedy 2006, 21), but it also goes beyond. As a matter of fact, the law of the global

economy interacts with most other legal fields in non-trivial ways, and can often be considered the driving force of their ‘transnationalisation’. It is the ubiquity of economics, which calls for an alternative point of view that also reflects on this dominance. Economic sociology helps to put economics into perspective, including transnational law and economics (ch. 47, this volume [book proposal p. 13]), and to develop a sophisticated counter-position. What this ultimately results in is an economic sociology of transnational law.

Still, one may wonder if this is not overstretching one’s scholarly capacities: law reaching out to sociology to counter economics? Under conditions of high intra-disciplinary specialisation and inter-disciplinary fragmentation (cf. Cotterrell 1995, ch. 3), which reflects the principles of a functionally differentiated society (Luhmann 1990), this indeed seems to be the case. However, an integrative approach that combines legal analysis with a sociological perspective on matters regarding the economy is not unprecedented and was nothing unusual until about a hundred years ago – from Karl Marx to Max Weber and from Henry Sumner Maine to John Roger Commons. Until then, historical-holistic scholarship was prevailing across the social sciences, including law, economics, and the emerging discipline of sociology, over more positivist and reductionist approaches, which came to dominate social-scientific research in the twentieth century (cf. Habermas 1971; Pearson 1999; Mackaay 2000; Frerichs 2012).

At the beginning, economic sociology did not mark a sub-discipline of sociology yet, which became an independent discipline only in the late nineteenth and early twentieth century, claiming its own, distinctive theories, methods, and subject area, as well as chairs and courses at university. Instead, it was considered a branch within the larger field of ‘economy and society’ research, which economists and sociologists likewise contributed to. This integrated research field was occasionally referred to as ‘social economics’ and understood to include economic history, economic theory, and economic sociology (Swedberg 1987, 30; Maurer 2014). In this sense, economic sociology also serves as a placeholder for more integrative approaches to economy and society. The broader label, social economics, which is a historical term, or socio-economics, which is more common today, makes the interdisciplinary nature of this venture more explicit. However, it may also be considered as too inclusive. In fact, it has been argued that much of classical economics was, or at least implied, some sort of social economics, which would be at odd with today’s economic orthodoxy, and that even central figures of neoclassical economics made reference to social factors and dynamics which escape the standard model (Zafirovski 2014). In the nineteenth century, the term social economics was eventually used both by liberal economists, who

aimed to develop their discipline as a general social science as opposed to a policy-oriented science of the state (which is suggested by the notions of ‘national’ and ‘political’ economy), and by leftist scholars, who were interested in furthering a social economy based on relations of solidarity and cooperation as an alternative, or supplement, to the liberal market economy (Mikl-Horke 2015, 96-97).

The preferred term today is socio-economics (Hedtke 2015; Hellmich 2015), which has occasionally been extended to ‘law and socio-economics’ (which is the title of a journal published between 1997 and 2007). As social economics before, socio-economics acts as an interdisciplinary platform furthering a more “social-scientifically informed science of economics”, whereas economic sociology is understood to take a distinctly sociological approach to the economy (Hedtke 2015, 20-21). The term socio-economics gained currency through the *Society for the Advancement of Socio-Economics*, which was founded in 1989 (Etzioni 2003, 182). This is not only opposed to mainstream economics but it also developed in response to the *Society for the Advancement of Behavioral Economics*, which was founded in 1982 (Tomer 2015). What we can observe here is the differentiation of behavioural economics and socio-economics, which both distance themselves from neoclassical economics and the underlying rational choice approach: the premise that, among alternative ways of action, economic actors would always choose the utility-maximising option. In contrast, behavioural economics and socio-economics both start from the more ‘realistic’ assumption of bounded rationality. However, whereas behavioural economics lays more emphasis on cognitive biases, that is, our limited capacities to rationally process and evaluate information, socio-economics, including economic sociology, understands rationality, first of all, as context-bound, and highlights the social and cultural conditions of rational as well as non-rational action, or the construction of rationalities. In terms of interdisciplinary collaboration, behavioural economics is more oriented towards psychology and cognitive science and socio-economics towards sociology and other social-scientific disciplines.

Despite the rising popularity of behavioural economics, and the indisputable need for a sociological response (cf. Weber and Dawes 2005; Frerichs 2011a; Kittel 2015), there is a more important branch of scholarship straddling the boundaries between economics and sociology: institutional economics. This deserves a closer look in the present context as it is much concerned with the role of law as well as non-law – Jessup’s ‘other rules’ – in regulating the economy. Indeed, institutional economics is as much about formal institutions, “such as laws, regulations, courts, government programs and agencies”, as it is about informal institutions, which “include norms of behaviour, trust, and social networks,

collectively known as social capital” (Menyashev et al. 2011, 14-15). In other words, institutional economics considers legal rules, which are enforced by the state, side-by-side with social norms, which are sanctioned by society. One could add cognitive-cultural beliefs as the third pillar of institutions, next to their regulative and normative dimensions (Scott 2013, 57-70), but these are more prominently discussed in behavioural than in institutional economics: as ‘framing effects’. All three dimensions equally matter to sociology, which is the science of institutions par excellence. In fact, the sociological discipline was from the outset concerned with social institutions (cf. Nee 2005, 55), whereas they long remained at the margins of the economic discipline. Or, to be more precise, ‘old institutionalism’ – a school of economic thought reflecting the historical-holistic paradigm, which still prevailed at the turn of the twentieth century – was effectively sidelined by the upcoming neoclassical mainstream (Hodgson 1998, 167). In contrast, today’s ‘new institutionalism’ seems to have become some sort of ‘mainstream heterodoxy’ in the economic discipline (cf. Davis 2008). Indeed, what has come to be known as ‘new institutional economics’ can be understood as an ‘adaptation’ rather than a ‘rejection’ of the neoclassical standard model (Nee 2005, 50). This is evident in the conception of institutions as complementing the market – the abstract reference point of all neoclassical theorising – in a ‘socially productive’ or ‘unproductive’ way, that is, by either furthering or hindering economic growth (Menyashev et al. 2011, 13). This dichotomous view of institutions as pro- or anti-market tells us little about the social meaning of the respective institutions, or about the constructed nature of the market. Moreover, institutional economists tend to privilege certain institutions over others. This can be illustrated with Streeck’s forceful comparison between obligatory, collectively enforced ‘Durkheimian’ institutions and voluntary, privately contracted ‘Williamsonian’ institutions, which refers to well-known founding figures of classical historical sociology and new institutional economics, respectively (Streeck 2009, 154-157). Accordingly, contemporary political economies have been experiencing “a move from Durkheimian to Williamsonian institutions” (ibid., 156), which seems reflected in the concomitant rise of new institutional economics. This is basically the same as the turn from legal rules to social norms, or from public to private legal ordering in ‘governing’ the economy, which is advocated by scholars at the interface of law and economics, including transnational law and economics (cf. Zumbansen 2008, 803-804; Zumbansen and Calliess 2011, 3-4). Again, there is need for a sociological response, which can be given on different levels of analysis. At the “micro- and meso-levels of individuals and their interpersonal ties”, social relations and networks are emphasised, which are a source of informal, social norms that may

interact with formal, legal rules in shaping economic outcomes (Nee 2005, 56). In this respect, economic sociology, or what has been labelled “new institutional economic sociology” (ibid., 55), only mirrors, and eventually complements, the agenda of new institutional economics. But given the rich heritage of the field, this is not the only perspective economic sociology has to offer. Instead of the micro- and meso-levels of actors and relations, one can also take a more ‘holistic’ approach and focus on the macro- and meta-levels of regimes and rationalities (Frerichs 2009; 2011b). What comes to the fore, then, are the socio-economic regimes and scientific rationalities that shape our very understanding of both the law and the market and, by implication, also of the ‘other rules’ by which these idealisations of legal and economic theory are ‘complemented’ in reality: social norms and social institutions. In questioning the normative and cognitive foundations of our economic and legal systems, economic sociology blends into political economy (cf. Beckert and Streeck 2008). This perspective, and its potential for an economic sociology of law, will be explored in the remainder of this chapter.

Political Economy: Law in Modern Capitalism

Whereas classical political economy simply refers to the beginnings of the economic discipline, with its emblematic interest in the ‘wealth of nations’, new political economy is often equated with standard economic analysis applied to politics, or public choice theory. Our interest here is in a different kind of political-economic analysis, which has been referred to as ‘critical’ and, at times, ‘cultural’ political economy (cf. Jessop and Sum 2006). Moreover, a sociological bent can also be found in ‘comparative’ political economy. What these forms of political-economic analysis share is an interest in the foundations and development of modern capitalism, which is but another way of doing economic sociology. This is clear from the following definition: “the political economy of capitalism explores the concrete ways in which a dynamic market economy with private ownership in the means of production unfolds within modern society, using, transforming, and perhaps undermining the social relations on which its functioning depends” (Beckert and Streeck 2008, 14).

The beginnings of this type of political-economic analysis can be found in the work of Marx, who “was active before the birth of modern sociology” (Smelser and Swedberg 2005, 7) but can nevertheless be considered one of its founding fathers. One could even claim that his original plan to combine the ‘critique of political economy’ with a ‘critique of jurisprudence’ (Marx 1844, Preface) was the first outline of an economic sociology of law. In short, law was

linked with economics, both of which became the subject of critical, sociological analysis. Not surprisingly then, the greatest continuity in bringing law, economy, and society together is in Marxist and post-Marxist legal theory, which is a distinctly ‘social’ theory of law (Fine 2013, 96 and 107; cf. Buckel 2007, 15) that contextualises both law and economics.

Marx’ writings focused on the critique of political economy. In contrast, the critique of jurisprudence, which was meant to accompany this, was never fully developed. However, his work does include the very fundamental idea of ‘base’ and ‘superstructure’, which has been key in developing a ‘materialist’ theory of law. Accordingly, the ‘relations of productions’, which, in capitalism, are marked by the antagonism between ‘bourgeoisie’ and ‘proletariat’, capitalists and workers, constitute “the real foundation, on which arises a legal and political superstructure” (Marx 1859, Preface). This suggests a form of economic determinism in which law is but an epiphenomenon (Beirns and Sharlet 1980, 5). However, the rigidity of this link has long been contested within Marxist scholarship itself, key proponents of which attacked both the view of law as being independent from and the view of law as being determined by the will of the capitalist class. This has been referred to as dichotomy between ‘formalist’ and ‘instrumentalist’ approaches to law (ibid., 4), which is equally rejected by scholars such as Evgeny Pashukanis, Isaac Balbus, and Pierre Bourdieu: a Russian legal theorist, an American political scientist, and a French sociologist.

For Pashukanis, a ‘general theory of law’ had to abstain from simply reproducing the ideology of law by hypostatising its concepts, as it is done in the formalist approach, but also from merely “declaring them ‘fictions’, ‘ideological fantasies’, ‘projections’” and replacing them with “concepts of an extra-judicial nature”, as it is done in the instrumentalist approach (Pashukanis 1980 [1924], 41). In Balbus’ terms, the formalist approach, which treats law as “closed, autonomous system whose development is to be understood exclusively in terms of its own ‘internal dynamics’”, fails as much to explain the role law plays in a capitalist society as the instrumentalist approach, which “conceives of the law as a mere instrument or tool of the will of dominant social actors” (Balbus 1977, 571-572). Bourdieu refers to the same “two antagonistic perspectives, one from within, the other from outside the law”, which “together simply ignore the existence of an entire social universe (what I will term the ‘juridical field’), which is relatively independent of external determinations and pressures” (Bourdieu 1987, 816). All these thinkers turn to the form of law, which is understood to fulfil certain functions in capitalist society. Instead of claiming that the law is determined by the economy, they draw a parallel between the two, which has come to be referred to as ‘homology’ (Balbus 1977, 573; cf. Bourdieu 1987, 850). In the work of Pashukanis and Balbus, this is specified as

“an homology between the logic of the commodity form and the logic of the legal form” (Beirns and Sharlet 1980, 3; cf. Balbus 1977, 577, fn. 5). Secondary literature refers to this approach as the ‘commodity form theory of law’ (Fine 2013, 100) or ‘commodity exchange theory of law’ (Treviño 2008, 113). Importantly, this theory does not claim (yet) that law may itself take the form of a commodity, a point which will be made later in this chapter. Instead, it confines itself to illuminating what role the form of law plays in the commodification process.

The continuity with Marx’ reasoning is evident in Pashukanis’ as well as Balbus’ work. Pashukanis developed his theory of law in close analogy to Marx’ theory of political economy, which includes “searching for the relationships which constitute [law’s] real foundation” (Pashukanis 1980 [1924], 46). If the object of the critique of political economy was the ‘universal form of value’, which refers to the exchange value, or market price, of commodities, the object of the critique of jurisprudence, which Pashukanis puts forward based on his readings of Marx, is the “universality of the legal form” (ibid.). Both can be derived from commodity exchange, which is key to the organisation of capitalist society. Pashukanis thus considers, if not the origin of law, so at least its ‘maturation’ in capitalist society (ibid., 53) intricately connected with the generalisation of commodity exchange. For him, ‘bourgeois law’ crystallises in the legal concepts of property, contract, and personhood, which constitute a “society of commodity owners” (ibid., 75).

In Pashukanis’ words, property as “unlimited authority over a thing’ is merely a reflection of the unlimited circulation of commodities” (ibid., 84). The economic relation between objects exchanged on the market, including labour, is mirrored by the legal relation between subjects owning or appropriating these commodities: workers and capitalists. Commodity owners are attributed the quality of legal subjects who interact with each other through contracts as “an agreement of independent wills” (ibid., 82). In the case of commodified labour, ‘thing’ and ‘person’, subject and object of the exchange relation, remain closely tied to each other (cf. Fine 2013, 99). This is illustrated as follows: “Having fallen into servile dependence upon economic relations surreptitiously created in the form of the laws of value, the economic subject – as if in compensation – receives a rare gift in his capacity as a legal subject: a legally presumed will, making him absolutely free and equal among other owners of commodities.” (Pashukanis 1980 [1924], 77) In short, the formal equality of workers as subjects of rights conceals the material dependence of the labour force from the market price. Balbus, who developed his theory independently from Pashukanis (Balbus 1977, 577, fn. 5), but obviously drew on the same sources, comes to very similar conclusions, even though he

does not speak of commodity owners but of “citizens” (ibid., 575; cf. Buckel 2007, 132-133). What is more important, writing half a century later than Pashukanis, Balbus also comments on the transformation of capitalism “from competitive, laissez-faire capitalism to monopoly, State-regulated capitalism”, which he finds reflected in a parallel, or homologous, development of economic and legal forms (Balbus 1977, 587). More specifically, he refers to the ‘decommodification’ of labour, which – with wages now being politically negotiated – is no longer subjected to the exchange-value only, and a concomitant “erosion of the rule of Law”, according to which law has, in times of social engineering, become “less formalistic, more instrumentalist” in character (ibid., including fn. 13). Including regulatory economic and redistributive social law is an important step beyond Pashukanis, for whom “[p]ublic law can exist only as the reflection of the form of private law in the sphere of political organization” (Pashukanis 1980 [1924], 73). Technically, this means that law is no longer reduced to its function in the commodification process without considering its potential for decommodification.

Assuming, like Balbus, that the form and function of law varies between different stages of capitalist development helps to overcome some of the ‘rigidities’ of Marxist thinking without denying the elective affinity between law and economics in capitalist societies. For this, we will turn to a post-Marxist thinker, whose critique of the market society has not lost its topicality: Karl Polanyi.

Research Focus: The Law of Market Society

Polanyi’s work is a central reference in economic sociology and political economy, and illustrates well the core claims of the discipline. Moreover, even though his best-known *The Great Transformation* (Polanyi 1957 [1944]) does not address the law as a subject of its own, it has also caught the interest of legal scholars, namely those concerned with transnational law (Joerges and Falke 2011). The focus of Polanyi’s work was on the interrelatedness of economy and society, which he described using the notion of embeddedness. His most-cited statement about the market society is: “Instead of economy being embedded in social relations, social relations are embedded in the economic system.” (Polanyi 1957 [1944], 57) The embeddedness concept has become a core identifier of the discipline, even though it is interpreted slightly differently in ‘old’ and ‘new’ economic sociology (Krippner and Alvarez 2007). As a theorem, or research paradigm, it captures the sociological outlook on the economy, and markedly contrasts with the abstractions of neoclassical theory, such as the

institution-free market and utility-maximising behaviour. Polanyi's approach has been characterised as putting forward an "interior view" of the relationship between the economic and the social, which are seen as "mutually constituting" (Krippner and Alvarez 2007, 222). This characterises a 'holistic' approach, which starts from society as a whole, and not from distinctive social spheres. The economy's logical separation from the rest of society is to be explained and not to be taken for granted. Instead, neo-institutional approaches in economics as well as economic sociology (cf. Nee 2005) seem to suggest an "exterior relationship between the economic and the social" (Krippner and Alvarez 2007, 222), in which the distinction between two types of rationalities is taken as given.

Polanyi's general concern with the interrelations between economy and society translates into a specific interest in the mutual constitution of the "liberal state" and the "self-regulating market" (Polanyi 1957 [1944], 3). In *The Great Transformation*, he exposes the self-regulating market as a chimera of liberal economic thinking, and demonstrates how this idea creates havoc when it is implemented by force and across the board. While the idea of the self-regulating market is connected with a policy of "laissez-faire", or non-interference, this policy has to be "enforced by the state" (ibid., 139). Polanyi argues that "the introduction of free markets, far from doing away with the need for control, regulation, and intervention, enormously increased their range" (ibid., 140). In other words, politics and economics work hand in hand in creating the 'market society': a specific regime based on a specific rationality, which requires the commodification of 'land', 'labour', and 'money' (ibid., ch. 6). Law enters the picture as a regulatory instrument. Polanyi speaks of the "laws governing market economy", which we can interpret to include not only the laws of the (allegedly) self-regulating market, which "were put under the authority of Nature herself" (ibid., 125), but also the enforcement apparatus of the state, which implements these laws. As Polanyi's concern was with the fateful attempt of "economic liberalism" to establish "a self-regulating market on a world scale" (ibid., 138), we can infer that the subject of his critique extends to transnational economic law, as it was defined above.

It is thus possible to take inspiration from Polanyi's work in order to develop an economic sociology of transnational law. To highlight this aspect, we can speak of the 'law of market society' (Frerichs 2016) or even the 'constitution of market society' (Frerichs forthcoming). In an 'ordoliberal' reading, which is in line with economic functionalism, the law of market society consists of 'economic law' in the broadest sense, including enabling as well as restrictive law, private as well as public law, to the extent that it constitutes the 'market order' (Grundmann 2008, 554-555). Together, these legal norms, and complementary social

norms, make up the ‘economic constitution’. In other words, the economic constitution consists not only of those elements of the economic order which are codified in the formal constitution of a state but it includes all legal rules, as well as non-legal norms, that together constitute the economic order. Under conditions of economic liberalisation and integration, the latter extends beyond the state, forming international, supranational, or transnational regimes. While this functionalist perspective, in principle, “does not inform us about the validity claims of the economic constitution, let alone, its (normative) legitimacy” (Joerges 2005, 465), in practice, it does have normative effects, such as ‘keeping politics out’. Political intervention which does not support the law of the market is to be avoided.

In the present context, the ordoliberal way of thinking is invoked to illustrate the economic rationality behind the law of market society, but not advocated as such. Instead, the task of economic sociology, or the sociology of economics, is to contextualise and criticise the philosophy of economic liberalism and its practical effects. The critique of market society thus includes a critique of its constitutive concepts. From a sociological point of view, constitution can also mean ‘construction’, which encompasses not only the normative but also the cognitive dimension of how the market society is envisioned and enforced. Accordingly, “any economy, of whatever society, is socially and politically constructed, and [...] such construction, and reconstruction, takes place continuously in the course of social and political development” (Beckert and Streeck 2008, 12-13). Varying this idea, one can also speak of the legal construction of the economy and of economic rationalities (Lang 2013, 170) as well as of the economic construction of the law and of legal reasoning (Edelman 2004, 182).

In a nutshell, a “Polanyi-inspired” economic sociology of law (Randles 2003, 409; emphasis omitted) highlights the role of law in the commodification process as well as in a more decommodified stage of capitalist development. As to the latter, the golden years of ‘welfare capitalism’ (Pierson 2010; Garland 2014), which affluent Western countries experienced between the mid-1940s and the mid-1970s, can be considered a case in point. For this period, we can speak of a process of decommodification with regard to labour, whereas the developments following the neo-liberal turn in the 1980s can be depicted in terms of its recommodification. Similar oscillations can be observed for the ‘fictitious commodities’ of land and money (Polanyi 1957 [1944], ch. 6). As indicated above, the relative decommodification of social relations within welfare capitalism was reflected in a changing rationality of the law, with the ‘juridical rationality’ of enabling market law being counterweighed by a more ‘instrumentalist rationality’ of regulatory intervention (cf.

Michaels 2011). While the regulatory law of the welfare state was also redistributive in nature, this link can no longer be taken for granted. In fact, ‘law after the welfare state’ combines a new, legal formalism with a new, economic functionalism (Zumbansen 2008). The novelty is not that juridical and instrumentalist rationalities are combined but that the reference point of both enabling and regulatory law is increasingly trans-, supra- or post-national in character (Michaels 2011, 155-156).

Technically, commodification means that the fictions of the economic discipline are translated into legal concepts. Reversing this perspective, Supiot speaks of the “dogmatic foundations” of the market in “legal fictions” (Supiot 2007, 94). As argued above, the institutions of private property, contract of will, and legal personhood (not only for natural persons but also for corporations, which enjoy limited liability) reflect the necessities of market exchange in capitalist societies. Land, labour, and money can only be bought and sold for a market price by abstraction from their natural, social, and cultural underpinnings. Given the centrality of these institutions and fictions even in a ‘social’ market economy, decommodification is always relative to the state of commodification achieved or imposed before, and never absolute, save capitalism ceases to exist.

What the ‘commodity form theory of law’ does not consider, and what is also missing in Polanyi’s account of fictitious commodification, is that law itself can become a commodity which is reduced to its exchange-value. Law then appears as a production factor, just like labour, land, and money (or capital), which has a price. The commodity character of law is most concrete when regulatory competition allows a ‘law market’ to arise, and a certain legal rule or regime can be marketed and shopped for at the national, regional or global level (O’Hara and Ribstein 2009). In Polanyian terms, a regime furthering regulatory competition imitates the logic of a self-regulating market with regard to law. On a more abstract level, the rise of ‘economic constitutionalism’ (Frerichs forthcoming), which prioritises the “‘functional unity’ of private and public, national and international regulation of the economy” (Petersmann 2011, 536), furthers a way of thinking about the law, which is imbued with economics. Apart from ordoliberalism, which has been influential in Europe, this is also evident in the ‘economic analysis of law’, “the largest, most pervasive interdisciplinary field of legal studies in the history of American law” (Posner 1995, 275). The economic analysis of law, or what has become the mainstream of law and economics, takes law as a variable not only to be explained (in positive analysis) but also to be manipulated in order to better meet economic interests (in normative analysis) (cf. Brion 2000). In other words, by reconstructing law in economic terms, law and economics promotes a ‘market mentality’ in the legal field

(cf. Polanyi 1996 [1947]; Steiner 2009, 105-106). Inasmuch as the economic sociology of law sheds light on the conditions and consequences of this transformation, it includes a sociology of law and economics.

Conclusion: A Transnational Legal Profession

Going beyond national and international, public and private law, transnational law lays emphasis on the ‘other rules’ that make up the global economy. Accordingly, there is a strong tendency to frame transnational law in economic terms. Economic sociology helps to understand and counter this trend by putting economics into perspective. As a sub-discipline of sociology, economic sociology developed in opposition to neoclassical mainstream economics. However, it also forms part of an interdisciplinary field of more or less ‘heterodox’ approaches, which includes socio-economics, behavioural economics, and institutional economics. Whereas new institutional economics and new institutional economic sociology converge in emphasising the role of social norms and institutions in ‘complementing’ the market, this is not all a sociological perspective on the economy can offer. Drawing on the tradition of critical political economy and its adaptations to the law, this chapter outlined an economic sociology of law, which exposes the constructed nature of the law of the market and elucidates the elective affinity of law and economics in capitalist societies, including their welfarist and post-welfarist variants. Viewed from this perspective, the recent rise of economic functionalism ultimately promotes the commodification of law.

To conclude this chapter, we will briefly address the challenge of ‘doing’ transnational law under the supremacy of economic ways of thinking. For this purpose, we will return to Bourdieu, whose notion of homology did not refer to the shared logic of commodity form and legal form but to the cultural affinities between actors in the juridical field and actors in the field of power: “There is no doubt that the practice of those responsible for ‘producing’ or applying the law owes a great deal to the similarities which link the holders of this quintessential form of symbolic power to the holders of worldly power in general, whether political or economic.” (Bourdieu 1987, 842) It is instructive to apply this approach not only to national legal fields, but also to consider their internationalisation. The question “what role law and lawyers play in the global economic and political restructuring currently underway” (Trubek et al. 1994, 408) is fruitfully addressed by scholars concerned with the globalisation of law in the wake of the neo-liberal turn of the 1980s. What they find is that the dominant ‘mode of production of law’ in the emerging transnational legal field eventually mirrors the

“hegemony of neo-liberal concepts of economic relations” (ibid., 409). What is of interest here is not only the parallel development of economic and legal modes of production but also the observation that the legal and the economic profession follow a similar path of globalisation. The internationalisation of legal fields and the transnationalisation of law thus goes along with the construction of a global legal profession, which privileges ‘American’ over ‘European’ ways of law (cf. Kagan 2007). A similar story can be told for the transnationalisation of economics and the construction of a global economic profession, which was once as much rooted in national and regional specificities as its legal counterpart (Fourcade 2006). In short, different relations of production also bring about different kinds of lawyers and economists, which understand the form and function of law in different terms. The Bourdieusian approach is marketed as sociology of law (Dezalay and Madsen 2012), but it has its underpinnings in an economic sociology which takes “the economy of the conditions of production and reproduction of the agents and institutions of economic, cultural and social production and reproduction” as its object (Bourdieu 2005, 13). As a matter of fact, it thus also contributes to the economic sociology of law. It seems relevant to conclude with this perspective because transnational law was defined above not only as a field but also as a method, which suggests shifting from questions of ontology to questions of epistemology. This implies a turn away from the ‘product’ to the ‘producers’ of transnational law, which includes the readers of this volume. In one way or another, these will encounter an economic way of thinking, which may be hard to overcome, both in theory and in practice.

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